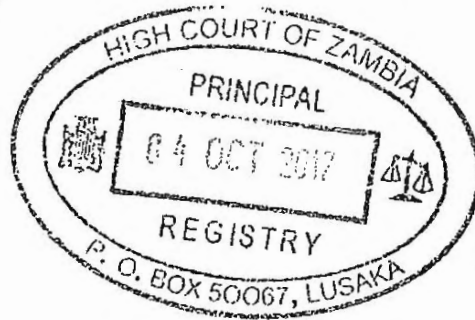


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Divorce Jurisdiction)

2017/HPF/D.156

BETWEEN:

ABRAHAM PHIRI



Petitioner

AND

MILDRED MULENGA LUPUPA PHIRI

Respondent

Before the Hon. Mrs. Justice N.A. Sharpe-Phiri on the 4th October 2017

For the Petitioner: Mr. Abraham Phiri, in person

For the Respondent: Mrs. Mildred Mulenga Lupupa Phiri, in person

J U D G M E N T

Authorities referred to:

1. *Matrimonial Causes Act, Number 20 of 2007 of the Laws of Zambia.*
2. *Mahande Vs Mahande (1976) ZR 287 SC*
3. *Anne Susan Dewar Vs Peter Alexander Dewar (1971) Z.R. 38 (H.C.)*

This is a defended Petition for dissolution of marriage filed by the Petitioner, *Abraham Phiri* on 27th June 2017. The Petitioner seeks to dissolve his marriage to the Respondent, *Mildred Mulenga Lupupa Phiri*, contracted on 21st December 2003 at Lusaka Civic Centre, at Lusaka District in the Lusaka Province of the Republic of Zambia.

The Petition was made pursuant to **Sections 8 and 9(1) (b) of the *Matrimonial Causes Act, Number 20 of 2007 of the Laws of Zambia.***

In his Petition, the Petitioner contends that he was lawfully married to the Respondent on 21st December 2003 at Lusaka Civic Centre, Lusaka District in the Lusaka Province of the Republic of Zambia; that the parties last lived together as husband and wife at plot number A1290, Meanwood Kwamwena Valley Housing Project Chongwe District on the 2nd day of December 2015 and that they are both domiciled in Zambia.

He states further in his Petition that there are 2 children of the family now living who have been born to the Respondent in as far as is known to the Petitioner and that there are no other children born outside wedlock now living. Further, in the Statement as to the arrangement for the children of the family filed on even date by the Petitioner, it showed that the said children of the family are both under the age of 16, namely Chikumbuso Phiri who is in Grade 7 at Mumana Primary School and Jessica Mulenga Phiri who is in Grade 3 at Meanpark Private School.

The Petition also shows that there have been no previous proceedings in any Court in Zambia between him and the Respondent with reference to their marriage or with reference to any property or both of them and that there are no proceedings continuing in any Court outside Zambia in respect of the said marriage capable of affecting its validity or subsistence. The Petition also shows that there are no arrangements made for the support of the children of the family.

Finally, the Petitioner contends that the marriage has broken down irretrievably by reason of the fact that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

The particulars of the unreasonable behavior alleged by the Petitioner are summarized as below:

1. That the Respondent has refused to resume cohabitation with the Petitioner from the time that she left the matrimonial home on the 2nd day of December, 2015.
2. That the Respondent has been denying the Petitioner of his conjugal rights for a continuous period of 2 years and 3 months immediately preceding the presentation of this Petition.
3. That the Respondent stopped to perform her marital duties in the matrimonial home.
4. That the Respondent used to spend nights out of the matrimonial home without any reasonable justification a behavior that the Petitioner finds intolerable.

The Petitioner through his Petition prayed that the marriage herein be dissolved, for an order for property settlement, that there be no order for property settlement, that he be granted custody of the children of the family with reasonable access to the Respondent and that costs be in the cause.

The Respondent filed her answer on the 27th day of September, 2017. Prior to the filing of the answer, the matter had been scheduled to come up for hearing on two occasions, on which two occasions it was adjourned firstly due to the absence of the Respondent and no proof of

service was filed on record and on the second instance due to the fact that the Respondent requested for more time to file the Answer herein. She consequently filed the answer as stated above.

In the Answer to the Petition herein, the Respondent in paragraph 1 admitted the contents of paragraphs 1 to 8 of the Petition.

In paragraph 2 and 3 of the Answer, the Respondent denied the contents of paragraphs 9 to 11 of the Petition and averred that there are no proper grounds upon which the Marriage should be dissolved as prayed by the Petitioner and that she has not behaved unreasonable as alleged by the Petitioner. She had further stated that she has on several occasions initiated reconciliation every time she goes to see the children of the family but that the Petitioner refuses to let her into the house.

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In paragraphs 4, 5 and 6 of the Respondent's Answer, she denies the particulars of unreasonable behavior alleged against her in the Petition. She has averred that she has not behaved unreasonably and that she has on several occasions initiated reconciliation in order to resume cohabitation with the Petitioner as she still loves him despite the misunderstandings they have experienced in their marriage. She states further that despite her attempts to reconcile, the Petitioner still refuses to resume cohabitation.

She has further averred in her answer that the Petitioner even boasts that he would rather have conjugal rights with young girls than the Respondent. She also denies the allegation that she stopped performing marital duties in the matrimonial home as she used to leave everything

for the Petitioner such as food and clothing whenever she was working on night shift at Mum's Care Hospital.

In paragraph 7 of the Answer, the Respondent admits that she used to spend nights out of the matrimonial home but that the Petitioner was aware that she used to work night shift at Mum's Care Clinic and that the Petitioner permitted her.

The Respondent in her Answer prayed that the Petition be dismissed, and in the alternative, that should the marriage be dissolved that she be granted custody of the 2 children of the family more so that the said children are young girls under the age of 16, that there be an order for property settlement for property acquired during the subsistence of their marriage and that costs be in the cause.

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When the matter came up for trial on the 20th day of October, 2017, both parties were present. The Petitioner during his examination in chief gave evidence that he was the named Petitioner herein and was in occupation as a Clinical Officer General. He also testified that there were two children of the family namely Chikumbuso Phiri, a female born on 26th march 2005 and Jessica Mulenga Phiri born on 24th October 2009. He basically recounted the contents of his Petition and produced the Marriage Certificate as proof of their marriage, which was admitted as exhibit marked P1.

The Petitioner also testified that the Respondent works as a Pharmacy Technologist and currently lives in Chipata. He narrated that he came to court to have his Marriage with the Respondent dissolved as the

Respondent had behaved in a way that he could not reasonably be expected to live with her. He stated that they started quarreling when they moved to Meanwood in 2012 and that the Respondent would leave the matrimonial bedroom whenever they had a small quarrel to sleep on the chair in the sitting room.

The Petitioner recounted to the Court how the Respondent left the matrimonial home for almost a month on 30th October, 2013 to go and live with her parents in Garden House and that she refused to come back even after he followed her in the company of his witness to try and talk her into coming back to the matrimonial home. That during this time, their first born daughter got burnt while she was preparing the meal for the family and that he informed the Respondent and her family and asked the Respondent to come back as their daughter who was 8 years old then was too young to be cooking for the family. His testimony was that the wife declined to come back to stay at their matrimonial home but that she only came with her aunties and suggested that she takes their daughter. The Petitioner stated that he agreed that their first born daughter goes to Garden House with the Respondent as it was near to the hospital where he worked and it would be easier for the Respondent to take the child to the Hospital where the Petitioner worked on a daily basis for the child's wound to be cleaned until it healed.

However, the Respondent is said to have left without taking the child with her but that she came back later to say that she will return to the matrimonial home until their daughter got better but not for the marriage. The Petitioner further narrated that they stayed like that but the marriage was not good as the Respondent would refuse to have sex,

could not wash clothes and refused to cook. He submitted in evidence that the Respondent used to prepare all the meals for the children and that at times even 2 weeks would pass without seeing the Respondent even though they stayed together. He reiterated that whenever he would ask the Respondent for sex she would refuse and violently so, a situation which led him to suffer from battered syndrome and depression. He also stated that he had several scars on his back due to such kind of violence on the part of the Respondent and that he made regular reports at Police but that the Respondent used to tear apart the medical reports.

He testified further that in 2014 their relationship became so sour after he went to UTH to consult a doctor as to why he felt so terrified whenever he had the desire to have sex. When he went to UTH, he narrated that he was given some drugs to be taking by the Urologist and the Psychiatry Department recommended counseling for both himself and the Respondent to which he stated that the Respondent initially agreed but refused to come along for counseling in January, 2015 arguing that she did not have a problem herself. He narrated how the couple continued on that path and that in August 2015 the Respondent moved out of the matrimonial bedroom to start sleeping with their children and this trend continued until 2nd December 2015 when she finally decided to move out of the matrimonial home.

He submitted that she left the matrimonial home after the couple quarreled over her shouting at their children. That a week after she left, the Petitioner followed with their youngest daughter to the house where she was staying to try and reconcile with her but the Respondent refused to return to the matrimonial home. That he further pleaded with her to

come back home on two other occasions being towards the end of December, 2015 and in February 2016. In May 2016, the Petitioner stated that he was informed by the Respondent's relatives that she wanted to come back home but she refused to come along when he went to pick her. He then waited for her to return until June 2017 when he filed the Petition herein in which he has sought among other reliefs the dissolution of his marriage to the Respondent.

During cross examination, the Petitioner responded that he suspected the Respondent was having an affair and that that is why she stopped having sex with him and that the Respondent left the house because the couple quarreled about the Petitioner's inability to perform sex. He also denied having ever made a statement that he had small girlfriends insisting that if he had he would not have been pleading with the Respondent and would have married by now. He also denied being a drug abuser and smoker saying he only used BP medication.

The Petitioner admitted that the Respondent had asked him whether she could start work so that she could be helping out with her school fees. He also denied that he never chased the Respondent from the matrimonial bedroom by kicking her but that it was the Respondent who used to refuse to be touched and used violence whenever he tried to touch her. He also stated that the issue of him failing to perform in bed started with the Respondent's refusal to have sex with him and that is the more reason he sought help from the Psychiatrist and the Urologist. During the same cross examination, the Petitioner also testified that the Respondent never requested to take the children of the family and that she even said to the youngest daughter it was her that made the

marriage to end because of her irritability and crying. It was also disclosed that when leaving the matrimonial home the Respondent said that she was leaving for good and would never come back.

As regards the issue of the Respondent's school fees, the Petitioner conceded that he helped the Respondent by contributing half towards her fees for only 1 and a half years but not in the final year as their relationship had soured at the time. The Petitioner also disclosed that the Respondent would wake up early to wash and cook for the children only but that she had not done his washing since 2013.

There was no re-examination of the Petitioner and he did not call any further witnesses.

The Respondent then proceeded to give her evidence via the examination in chief. She stated that she was 34 years and resided at DK Stadium in Chipata and was in occupation as a Pharmacy Technologist. She submitted that she did not want the marriage to be dissolved as her departure from their matrimonial home was meant to give the Petitioner time to change his bad ways such as smoking and drug abuse. She further stated that she had given her life to Christ and therefore the marriage had to go on till death do them part. She conceded that the Petitioner is the one that gave her the opportunity to go to school and she was really appreciative though in the midst of her studies he started wishing her bad luck and stopped providing for her transportation and food and that is what made her look for employment to enable her support herself.

She testified that her husband's none performance sexually was caused by his girlfriends. She lamented that the Petitioner used to accuse her of being infected with HIV and would say that no matter how one tried to perform sexually he cannot succeed due to the issue of the sickness. She also gave an account of how she found photos of the Petitioner in his phone using towels that had gone missing in their home while he was with another woman. She stated that the Petitioner had stopped respecting her and would openly answer his girlfriend's calls whenever his phone rung and they would talk about booking into a lodge while the Respondent listened. She said the Petitioner would tell his girlfriend that there was no relationship between himself and the Respondent. She however insisted that if the Petitioner could change his ways, their marriage could still work.

On the issue of counseling and the circumstances leading up to the Respondent's departure from the matrimonial home, the Respondent recalled that she considered the matter of counseling at UTH as false as the Petitioner had confessed that he performed sexually well outside marriage and therefore she saw no need for them to be counseled. She reiterated that she did her best to try and help him perform sexually but that when he failed to do so he would chase her from the matrimonial bedroom. She recounted that when they shifted to Meanwood, the Petitioner threw out the Respondent's clothes and chased her from the bedroom and she then moved to their children's bedroom. That the Petitioner used to demand from the Respondent a sum of K1,000 per month for her continued stay in the children's bedroom until he eventually threw her luggage outside the house and asked her to leave so that he could remarry someone younger. This happened on 2nd

December, 2015 and the Petitioner even booked a Taxi for her to leave the home. She stated that the Petitioner currently stays with a young maid whom he takes to many places including the Airport.

She also recalled that after she left her matrimonial home, she was transferred to work in Chipata District. She also confirmed that she did not accept to go back to the matrimonial home whenever the Petitioner came to plead with her as he used to come drunk and alone and that she wanted him to come with his relatives.

During cross examination, the Respondent denied that the Petitioner had come with someone else in December 2015 to plead for her to return to their matrimonial home. The Respondent also conceded that she had told the Petitioner that she would only return to him if he changed his behavior. She concluded that she had evidence that the woman staying with the Petitioner was not just a maid as the Petitioner posts photos of her on instagram and has openly told the Respondent that he would find someone else to marry.

The Respondent also denied that she was disrespectful to the Petitioner's relatives.

In the final part of the Respondent's cross examination she was asked why she would still want the marriage to continue assuming that the Petitioner never changes his alleged bad ways. She responded that she believed the Petitioner had changed as he has confessed so to the Respondent's relatives.

There was no re-examination of the Respondent and she called no further witnesses.

I have carefully considered the evidence of both parties to the Petition and their submissions herein.

The sole ground upon which a marriage may be dissolved is that the marriage has broken down irretrievably. This is in accordance with **Section 8 of the Matrimonial Causes Act** which sets out the sole ground of divorce as being irretrievable breakdown of the marriage. Therefore, a Petitioner is required to prove that the marriage has broken down irretrievably.

On the issue of proof of the breakdown of the marriage, **Section 9 of the Matrimonial Causes Act** sets out the facts upon which a party may rely to prove the irretrievable breakdown of the marriage.

This Petition has been brought pursuant to **Sections 8 and 9(1)(b) of the Matrimonial Causes Act** which stipulates that *for purpose of section eight the court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the Petitioner satisfies the court of one or more of the following facts.*

Subsection (b) states *that one of the facts being where the Petitioner can prove that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.*

In the case of **Mahande Vs Mahande**, the Supreme Court endeavoured to deliberate upon what would constitute behavior that could lead to the court concluding that either or both parties to the marriage cannot reasonably be expected to live together. The Supreme Court noted the following:

With great respect to the learned judge I cannot say that I altogether agree that two violent persons can reasonably be expected to live together - but I certainly agree with the underlying principle. In Katz v Katz (4) at it. 223 b to e Sir George Baker, P., had this to say (see also 1972 1 WLR at pp. 959960 H to D):

"A word about the law. Section 2 (1) (b) of the Divorce Reform Act 1969 under which this petition is brought, requires first that the husband 'has behaved'. Behaviour is something more than mere state of affairs or a state of mind, such as for example, a repugnance to sexual intercourse, or a feeling that the wife is not reciprocating his love, or not being as demonstrative as he thinks she should be. Behaviour in this context is action or conduct by the one which affects the other. Such conduct may take either acts or the form of an act or omission or may be a course of conduct and, in my view, it must have some reference to the marriage. Then the question is what is the standard of the behaviour? The standard is that he must behave 'in such a way that the petitioner cannot reasonably be expected to live with

the respondent'. That is the test. It is for the judge, not the petitioner alone, to decide whether the behaviour is sufficiently grave to fulfil that test, that is, to make it unreasonable to expect the petitioner to endure it, to live with the respondent. Also it is for the judge to say whether the marriage has irretrievably broken down. To that extent I agree with what Bagnall, J, said in Ash v Ash (3). The court must consider the effect of the behaviour on the particular petitioner and ask the question: is it established, not that she is tired of the respondent or, colloquially, fed up with him, but, that she cannot reasonably be expected to live with him? In a sense it seems to me wrong to call it, as we are apt to do, unreasonable behaviour. It is behaviour that causes the court to come to the conclusion that it is of such gravity that the wife cannot reasonably be expected to live with him."

Further, in the case of **Anne Susan Dewar Vs Peter Alexander Dewar** the court held that;

In a petition alleging unreasonable behaviour the test is objective having regard to the characters and personalities of the parties, and the whole background and history of the marriage must be considered

The Petitioner has presented his Petition on the basis of **Sections 8 and 9 (1) (b) of the Matrimonial Cause Act** that the marriage has broken

down irretrievably on account of the unreasonable behavior of the Respondent. I am of the view, based on the totality of the evidence given by both parties, that the parties to the marriage have fallen out of favour and love with each other, particularly, as the evidence of the Petitioner was that the couple started quarreling and often times violently so from the time they moved to their Meanwood home in 2012 which led to failure on the part of the Petitioner to perform sexually in their marriage. That this quarreling, violence and lack of sex in their marriage finally led to the Respondent leaving the matrimonial home on the 2nd day of December 2015. The Petitioner has also developed mistrust for the Respondent on account of the times she used to spend outside their home on account of her work at Mum's Care Clinic. The Petitioner also alleges that the Respondent had at some point blamed their youngest daughter as being responsible for their failing marriage due to her irritability and crying, an allegation which the Respondent did not rebut in her evidence.

It is clear that the parties used to quarrel and fight as testified by both parties though each one of them blames the other for the violence. However the Respondent has not denied that she had acted so violently to the extent of leaving the Petitioner's back with scars. It is also undisputed that the couple has not been exercising its conjugal obligations though there are counter reasons on both sides as to why this is the case.

The couple even when faced with a child who at one point got burnt and needed their joint affection as loving parents would be expected to be, they still never used the opportunity to reconcile but rather got worse. It

was the Petitioner's evidence that even when the Respondent returned to the matrimonial home so that she could help to nurse their first born daughter, she made it blatantly clear that she was only returning for the child and not the marriage. The Petitioner testified that during this period, the situation in the home only got worse as between them as a couple.

The Respondent also testified that the Petitioner kept dreadlocks, was an alcoholic and drug abuser, smoked and had younger girlfriends whom he boasts of satisfying him sexually all of which allegations the Petitioner denied save for the fact that he kept dreadlocks at some point and that the only drug he takes is the BP medication and not marijuana as alleged by the Respondent. The Respondent amidst all the allegations leveled against the Petitioner still feels that the marriage should not be dissolved as the Petitioner can change his ways and that he has in fact changed his behavior based on the information she has been given by her own relatives.

From the totality of the evidence given I am satisfied that the parties have failed in their obligations to perform their conjugal obligations to each other, and that the said failure and lack of mistrust has caused them to be violent and abusive, physically and emotionally, towards each other. This led to the Respondent leaving the matrimonial home in December 2015. The Respondent conceded that she had refused to return to the matrimonial home. The parties have not lived together for almost a period of 2 years. I have consider the totality of the evidence given by the parties as constituting irretrievable breakdown of the marriage on account of the Respondent's behavior and that the Petitioner cannot

reasonably be expected to live with the Respondent and I therefore find as such.

I am also satisfied by the Petitioner's submission that there is no chance of the parties reconciling or resuming cohabitation and I so find.

On the totality of the evidence, I am satisfied that the Petition has met the objective test as by law required to prove irretrievable breakdown of marriage on account of unreasonable behavior and hereby decree that the marriage solemnized under the provisions of the Marriage Act between **Abraham Phiri** and **Mildred Mulenga Lupupa Phiri** on 21st December, 2003 at Lusaka Civic Centre, Lusaka District in the Lusaka Province of the Republic of Zambia, has broken down irretrievably in terms of **Sections 8 and 9(1)(b) of the Matrimonial Causes Act No. 20 of 2007.**

I accordingly decree that the said marriage be dissolved and a decree *nisi* is hereby granted dissolving the marriage. The said decree is to be made absolute within six (6) weeks of the date hereof, unless sufficient cause be shown to the Court, why it should not be so made.


With regard to the issue of custody of the two children of the family namely: **Chikumbuso Phiri** and **Jessica Mulenga Phiri**, I order that the Petitioner shall continue to have custody of the children of the family as he had care and control of the children since the Respondent left the matrimonial home. I further order that the Respondent shall have liberal and reasonable access to the children of the family on days to be agreed between the parties. The Respondent is at liberty to apply to vary this

custody order should she so wish, within fourteen (14) days from the date hereof.

The question of maintenance and property settlement is referred to the learned Deputy Registrar for hearing and determination and either party is at liberty to apply in this regard.

I order that each party will bear its respective costs of this suit.

DELIVERED AT LUSAKA THIS 4TH DAY OF OCTOBER 2017


N.A. Sharpe-Phiri
HIGH COURT JUDGE